Supreme Court, U. S.
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No. 36, Original

In the Supreme Court of the United States

OCTOBER TERM, 1969

THE STATE OF TEXAS,
Plaintiff,

v.

THE STATE OF LOUISIANA,
Defendant,

UNITED STATES OF AMERICA,
Intervenor,

CITY OF PORT ARTHUR, TEXAS,
Intervenor.

ACCEPTANCE BY THE STATE OF LOUISIANA OF THE REPORT OF THE SPECIAL MASTER, WITH ONE EXCEPTION

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

WARREN E. MOULEDOUX
GARY KEYSER
Assistant Attorneys General

OLIVER P. STOCKWELL
EMMETT C. SOLE
Special Assistant
Attorneys General

TRIAL COUNSEL:

OLIVER P. STOCKWELL
Post Office Box 2900
Lake Charles, Louisiana 70601

ACCEPTANCE BY LOUISIANA OF THE SPECIAL MASTER'S REPORT, WITH ONE EXCEPTION, AND SUMMARY OF REASONS FOR EXCEPTION

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I. Louisiana accepts the Special Master's Report, with one exception 1

II. Louisiana excepts to that portion of the Special Master's Report which marks the boundary line between Texas and Louisiana through the geographic middle of the Middle Pass as Sabine River enters Sabine Lake, instead of in the geographic middle of the West Pass, thereby placing land admittedly in the State of Louisiana and on which taxes are presently being paid to Louisiana, in the State of Texas, for the following reasons:

(a) Louisiana's exception does not involve any disputed issues of fact, but relates solely to the misapplication of the law previously established by the Court in this case that the navigable channel is not to be considered in establishing the boundary 2

(b) The Special Master, in establishing the boundary in the excepted area, used the Middle Pass instead of the West Pass, on the west bank of which the Boundary Commission established the boundary between the Republic of Texas and the United States in 1840. The Act of 1848 moved Texas' boundary to the middle of West Pass 6

(c) The Special Master recognized that the boundary established by him in the ex-

cepted area places in Texas lands admittedly in Louisiana and on which taxes are presently being paid to Louisiana as evidenced by the following findings:

1. "Texas makes no claim to the three islands at the north end of Sabine Lake, perhaps because all three were originally selected by Louisiana under the Swamp Lands Grants of 1849 (9 Stat. 352), and 1850 (9 Stat. 519). The State of Louisiana subsequently patented these islands to individuals who now hold title thereto." (Report of Special Master, page 4) 10

2. " . . . . . Louisiana received a patent from the United States to the three islands in the north part of the lake, including Sabine Island, and later patented or deeded these islands to private parties; . . . . ." (Report of Special Master, p. 17).....10

3. "As to the three islands at the north end of the lake, some of which are west of the geographic middle of the Sabine River, the United States now makes no claim, perhaps because it relinquished title to these islands to the State of Louisiana under the Swamp Lands Act (See Louisiana Exhibit EEE.)." (Report of Special Master, p. 16).....11

(d) The location of the boundary in the excepted area by the Special Master dispossesses Louisiana of title to navigable

channels between the islands vested in Louisiana by virtue of its sovereignty 13

(e) No question of acquiescence is involved....14

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ACCEPTANCE BY THE STATE OF LOUISIANA OF THE REPORT OF THE SPECIAL MASTER, WITH ONE EXCEPTION

OPENING STATEMENT

The report of Judge Robert Van Pelt, Special Master, has been filed with the Court pursuant to an order entered on April 14, 1975, ordering the report filed and giving all parties until May 29, 1975 to file exceptions to the report, with supporting briefs, and until June 30, 1975, to file reply briefs, if any, to such exceptions. The State of Louisiana (Louisiana), Defendant, accepts and urges approval of the report, subject to one exception herein stated.

EXCEPTION

LOUISIANA EXCEPTS ONLY TO THAT PORTION OF THE SPECIAL MASTER'S REPORT WHICH MARKS THE BOUNDARY LINE BETWEEN TEXAS AND LOUISIANA THROUGH THE GEOGRAPHIC MIDDLE OF THE MIDDLE PASS AS SABINE RIVER ENTERS SABINE LAKE, INSTEAD OF IN THE GEOGRAPHIC MIDDLE OF THE WEST PASS, THEREBY PLACING LAND ADMITTEDLY IN THE STATE OF LOUISIANA AND ON WHICH TAXES ARE PRESENTLY BEING PAID TO LOUISIANA, IN THE STATE OF TEXAS.

In accepting the Special Master's (Master) report, except as to this one exception, Louisiana reserves the right to answer exceptions, if any, taken to the report by the State of Texas (Texas), the United States, or the City of Port Arthur, Texas.

This exception only involves a very small segment of the total boundary between Texas and Louisiana and does not involve any disputed fact issue. The facts on which Louisiana relies are undisputed and were so found by the Master.

The Court will recall from a prior consideration of this case that when the Republic of Texas was admitted into the Union in 1845 as "Texas", its eastern boundary was on the west bank of the Sabine River.

> "The United States renewed its efforts to acquire Texas, and when Mexico declared its independence from Spain in 1821, the United States began negotiating anew for the purchase of Texas. In the Treaty of Limits, 1828, 8 Stat. 372, the United States and Mexico recognized the boundary 'be-

> tween the two countries,' id., at 374, on the west bank of the Sabine as established in the 1819 treaty with Spain. Texas declared its independence from Mexico in 1836, 1 Laws, Republic of Texas, 3-7, in Gammel's Laws of Texas 1822-1897, was recognized as an independent nation by the United States in 1837, Cong. Globe, 24th Cong., 2d Sess., 83, 270, and in 1838 the Sabine boundary agreed upon with Spain in 1819, and with Mexico in 1828, was adopted by the United States and Texas, 8 Stat. 511. The Sabine boundary remained unchanged when Texas was admitted as a State in 1845, 9 Stat. 108." [1]

The Court then concluded "that the western boundary of Louisiana is the geographical middle of the Sabine River, not its western bank or the *middle of its main channel.*" (Emphasis Ours) 410 U.S. 707. Having reached this conclusion, the Court found Texas' eastern boundary was extended to the geographic middle of the Sabine River, Sabine Lake and Sabine Pass in 1848 to coincide with Louisiana's western boundary.

> "The Special Master was also correct in ruling that the United States intended the geographic middle of the river, not of the main channel, or thalweg, to be the western boundary of the State. The argument that the middle of the main channel was intended rests on the line of cases in this Court beginning with Iowa v. Illinois, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1893), which hold that in normal circumstances it should be assumed Congress intends the word 'middle'; to mean 'middle of the main channel' in order that each State would have equal access to the main navigable channel." (410 U.S. 709)

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[1] *Texas v. Louisiana*, 410 U.S. 702, 705, 93 S.Ct. 1215, 1217, 35 L.Ed. 646 (1973); reh. den. 411 U.S. 988, 93 S.Ct. 2266 (1973).

The Court, therefore, made it clear the question of *navigation* was *not* involved in locating the boundary.

When the boundary between the Republic of Texas and the United States was surveyed in 1840, it was located on the west bank of the west channel of Sabine River as it enters Sabine Lake.

In the Journal of the Joint Commission for surveying the boundary between the United States and Texas (1840), in describing the boundary in the area in dispute, the Commissioner stated:

> "May 22-Continued the demarcation along the western shore of the lake, crossing the mouth of Crane Bayou; thence to the entrance of the river Neches, into the lake; thence across the mouth of that river, immediately above the little island in the lake designated on the plan of the Sabine river and lake by the name of Jones's island; thence west of said island, around the peninsula formed by the projection of the point of land between the Neches and Alligator cove; thence around the cove and western borders of the lake, as delineated on the plan or map; thence around Point Young, *along the western pass by which the river Sabine enters the lake*; thence *northeasterly along the western bank of the river Sabine*, traversing the mouths of Cow Bayou and Adams' bayou, and around the promontory designated as Horse-shoe bend; thence north westerly to Huntly, situated at Green's bluff."[2] (Emphasis ours)

West Pass is shown on the plat of survey attached to the Commission's report, an excerpt of which follows:

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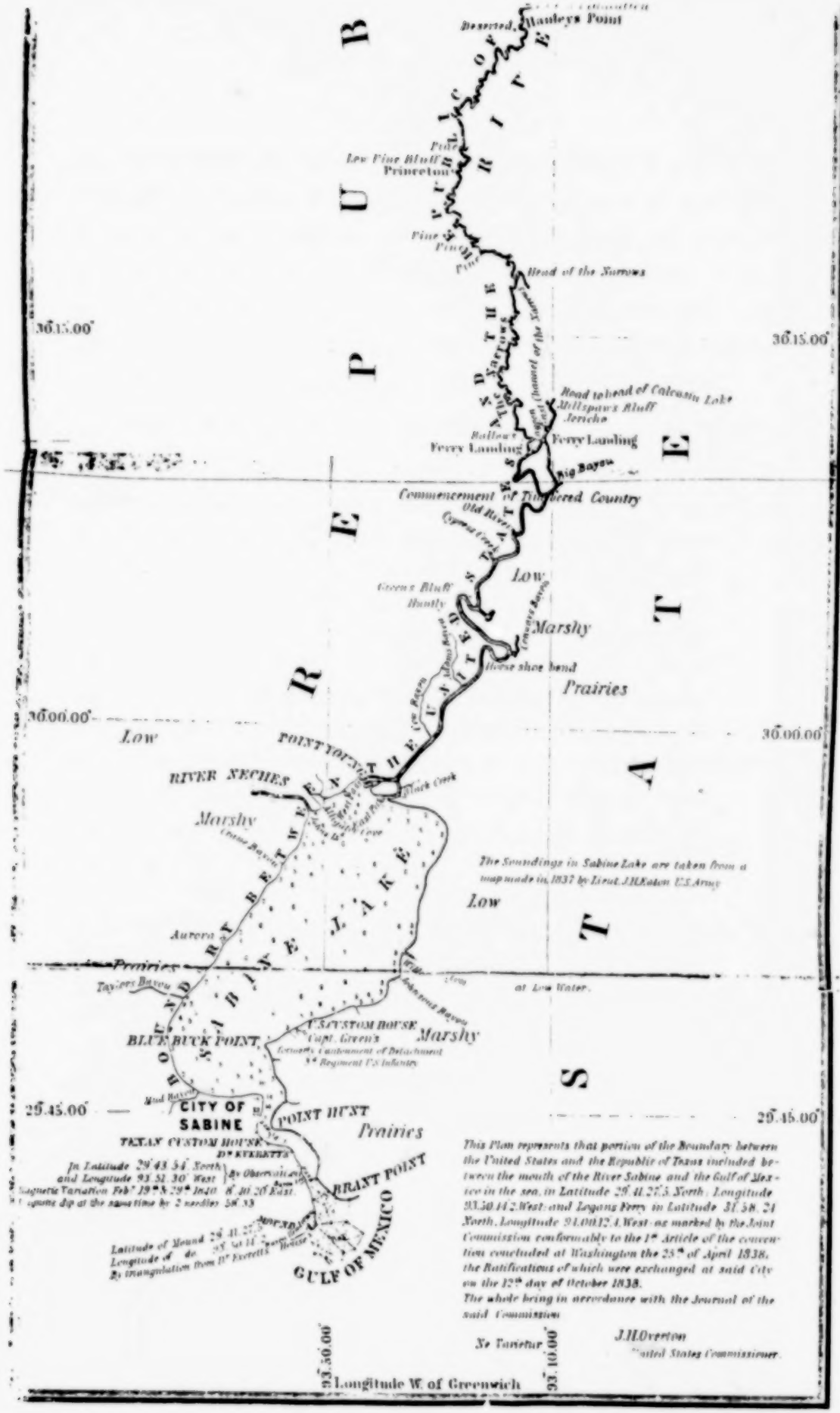
[2] Louisiana Exhibit A, Item 14, p. 224-225.


Beacon, Hanleys Point
Low Pine Bluff
Princeton
Head of the Narrows
Head to head of Calcasieu Lake
Millspaws Bluff
Jericho
Ferry Landing
Ferry Landing
Big Bayou
Commencement of Timbered Country
Low
Marshy
Prairies
Low
POINT TORTAHUE
RIVER NECHES
Marshy
Aurora
Prairies
Low
at Low Water.
U.S. CUSTOM HOUSE
Capt. Green's
Marshy
BLUE BUCK POINT.
CITY OF SABINE
POINT HUNT
Prairies
TEXAN CUSTOM HOUSE
Dr KERR'S
BRANT POINT
GULF OF MEXICO
30.15.00
30.00.00
29.45.00
93.50.00
93.40.00
Longitude W. of Greenwich
The Soundings in Sabine Lake are taken from a map made in 1837 by Lieut. J.H.Eaton U.S.Army
This Plan represents that portion of the Boundary between the United States and the Republic of Texas included between the mouth of the River Sabine and the Gulf of Mexico in the sea, in Latitude 29° 41' 27".5 North, Longitude 93.50 14.2 West; and Logans Ferry in Latitude 31.58. 21 North, Longitude 94.00 12.4 West, as marked by the Joint Commission conformably to the 1st Article of the convention concluded at Washington the 25th of April 1838, the Ratifications of which were exchanged at said City on the 12th day of October 1838.
The whole being in accordance with the Journal of the said Commission
Se Tarletar
J.H.Overton
United States Commissioner.

The Master erred in considering navigation as the criteria to locate the boundary in the middle channel where the Sabine River enters Sabine Lake instead of using the channel of the Sabine River which was used in locating the boundary by the Commission in 1840. This is contrary to the ruling of this Court in rejecting the "thalweg doctrine" in the original hearing on the recommendation of the Master. In discussing this issue the Master said:

> "An examination of these two exhibits shows that in 1840 there were two chief channels where the Sabine River entered Sabine Lake. One is on the east side of the largest island in the area and the other channel is on the west side of that island. This island, as has been noted, is sometimes called Shell Island and other times called Sabine Island. Soundings noted on these exhibits indicate both passes were 24 feet in depth in the area of Sabine Island whereas farther out in the lake in this area the depth was only three or four feet. One pass is named and marked on this 1840 map as the east pass and one is named and marked as the west pass. On later maps the pass marked east pass on the 1840 map is called middle pass and the eastmost pass which is unmarked on the 1840 map is called the east pass. Aerial photographs of the area, in evidence as Louisiana Exhibit X-1 and X-2, show clearly the three islands at the north end of the lake and the channels by which the Sabine flows into the lake. Your Special Master believes these aerial photographs support the recommendation hereafter made as to the pass to be used in determining the State Boundary." (Report of the Special Master, page 9).

The plat referred to by the Master was in error in

designating the middle pass as the East Pass. This can be seen by copy of a portion of the plat attached to the Commission's report set out previously in this brief. That plat shows three islands with the westernmost pass designated as West Pass and the easternmost pass designated as East Pass and with no name for the middle pass.

The Master recognized, as he must, the existence of the West Pass, but used the Middle Pass because he determined it carried more water than the West Pass. Here again, the Master was considering the size of the pass *instead of using the channel of the Sabine as it entered the Lake, on the west bank of which was located the boundary between Texas and the United States when Texas was admitted into the Union in 1845.* In 1848 the boundary was moved to the geographic middle of West Pass to coincide with the boundary of Louisiana. It was not moved to another pass or channel so as to deprive Louisiana of land already recognized as belonging to Louisiana.

When this same issue arose in a prior dispute between Texas and Louisiana, at another location along the boundary, it was settled by the Department of Interior that the boundary between Texas and Louisiana followed the westernmost channel.[3]

Texas patented land on an island between the two channels of Sabine River at the "Narrows", as did Louisiana. Texas had retained title to all unappropriated

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[3] Texas Exhibit B, Item 1.

public land when it was admitted as a State of the Union in 1845.[4]

The question of the "Narrows" was finally submitted to the Secretary of the Interior, General Land Office, for his decision. The basic question was a determination of which channel of the Sabine was used in fixing the western boundary in the Treaty of 1819, which was later surveyed in 1840-41. It was held that the islands in Sabine River, at the point known as the "Narrows" had passed to Louisiana from the United States under its Swamp Lands Grants.[5] The west bank of the western channel of the River at this point was recognized as the boundary between Louisiana and Texas and the Master recognized this decision in his original Report.[6] Obviously, this case decided and held that the lands claimed by Texas were, in fact, in Louisiana. The Texas patents were then cancelled, as so testified by Mr. Ray Wisdom.[7]

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[4] 9 U.S. Stat. 108

[5] See: Texas Exhibit B, Items 1 and 6. Also Louisiana Exhibit EEE, Items 2-17.

[6] Appendix D(d), Report of Special Master, which reads: "(D.) 1932. Texas' Exhibit B, pp. 46-49. On March 1, 1932, the Acting Assistant Commissioner of the U. S. General Land Office wrote a letter to a Louisiana title company in response to questions about the water boundary between Texas and Louisiana. After outlining the history of the Sabine boundary between the two States, the Commissioner made reference to an earlier controversy over islands in Sabine River where it was held that for purposes of the island question, 'the *west bank of the western channel of the river at this point will be recognized as the boundary between the States of Louisiana and Texas.' The Commissioner then stated: 'This would appear to fix the boundary line through Sabine Lake, no differentiation between the river and the lake having appeared in any of the treaties or acts of Congress, supra'* " (Emphasis ours).

[7] Transcript (June 10, 1971), p. 572.

Mr. Frank Pierce, First Assistant Secretary, Commissioner of the Federal Land Office, in his opinion dated June 27, 1910, stated:

> "In the absence of any term limiting or restricting the boundary to a particular channel of the river, *the limits described would extend, by the plain language of the statute, to the farthest or western channel of the river*, even if the other descriptive term, 'including all islands,' had been omitted; but when considered together *those terms of description indicate with absolute certainty that the western boundary of the state is the farthest western branch or channel through which any part of the waters of the Sabine* River may naturally flow." (Emphasis Ours) [8]

This portion of the boundary has been recognized and stipulated to by the parties in this litigation.[9]

Texas does not dispute that the lands to the westernmost channel of the Sabine as it enters Sabine Lake were surveyed in 1838 and recognized in Louisiana by the United States Deputy Surveyor and patented to Louisiana[10] under the Swamp Lands Act.[11] Louisiana later issued patents transferring these lands to various individuals.

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[8] Texas Exhibit B, Item 1, p. 3.

[9] Texas Exhibit AAA 1-12.

[10] When Louisiana was admitted into the Union in 1812, title to all undisposed land was retained by the United States except the beds of navigable streams. The United States then surveyed all unappropriated lands in Louisiana. All titles to these lands emanated first from the Federal Government. This is the reason that this area in question was surveyed, platted, and transferred by the United States to Louisiana under the respective Swamp Lands Act.

[11] Louisiana Exhibit EEE, Items 2-17; Transcript (May 20, 1974), pp. 31-32.

The Master recognized this fact when he stated:

> "Texas makes no claim to the three islands at the north end of Sabine Lake, perhaps because all three were originally selected by Louisiana under the Swamp Lands Grants of 1849 (9 Stat. 352), and 1850 (9 Stat. 519). The State of Louisiana subsequently patented these islands to individuals who now hold title thereto." (Report, p. 4)
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> * * * *
>
> ". . . Louisiana received a patent from the United States to the three islands in the north part of the lake, including Sabine Island, and later patented or deeded these islands to private parties; . . ." (Report of Special Master, p. 17).

These lands are still being assessed to the same individuals or their successors in title as located in the Parish of Cameron, Louisiana, and taxes are currently being paid to the Parish of Cameron.[12] No evidence was introduced by Texas that the lands are assessed in Texas or that taxes were ever paid to Texas on the lands. Texas argues that, even though the lands are in Louisiana, nevertheless the boundary between Texas and Louisiana is in Middle Pass rather than the middle of the most westerly pass. There is no basis in law or fact for this contention.

The most conclusive evidence that these lands were never in or a part of Texas is the withdrawal by the United States of its claim thereto in this suit. In the United States' Motion for Leave to Intervene (Paragraphs III and V) it claimed ownership of these lands at

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[12] Louisiana Exhibit EEE, Items 20 and 21.

the north end of Sabine Lake where Sabine River enters it. After additional investigation, the United States subsequently withdrew its claim, conceding that these lands had been patented to Louisiana under various Swamp Lands Acts. The Master also recognized this fact in his Report:

> "As to the three islands at the north end of the lake, some of which are west of the geographic middle of the Sabine River, the United States now makes no claim, perhaps because it relinquished title to these islands to the State of Louisiana under the Swamp Lands Act (See Louisiana Exhibit EEE.)." (Report of Special Master, p. 16)

Louisiana introduced evidence which establishes that the U. S. Corps of Engineers treated the lands to the east bank of the west channel as in Louisiana as late as 1944.[13] Louisiana Exhibit GGG confirms that in 1900 West Pass of the Sabine River as it enters Sabine Lake was the navigable channel prior to the construction of the ship channel.[14]

The first ship channel was initially surveyed by the U. S. Corps of Engineers as entering the west channel, but was later changed to enter a small branch of Middle Pass and thereby partially obliterated the west channel with fill.[15] The channel was partially constructed under a

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[13] Louisiana Exhibits HHH and EEE-18

[14] Louisiana Exhibit GGG is dated January, 1901, but based on Corps of Engineers surveys from 1874 to June, 1900.

[15] See: Louisiana Exhibit FFF, p. 19 where it is stated: "As connection is made with the west branch of the Sabine River, the main stream would still carry most of the sediment into the lake as heretofore, but all silt from the Neches River would be carried into

right of way acquired by the Corps of Engineers from individuals who recited that the land was located in Cameron Parish, Louisiana.[16]

Even if navigation is a factor, although the Court has held it is not, United States Exhibits FFF and HHH and Louisiana Exhibits GGG and FFF[17] based on U. S. Coast and Geodetic Survey Chart No. 517 show conclusively that, in early 1900, at least, the main or deepwater channel of the Sabine River was the *westernmost channel* as the river entered Sabine Lake. The 6-foot depth contour in the lake goes up into the westernmost pass, not Middle Pass or the other passes to the east.

It was not until the 25-foot deep Sabine-Neches Canal was completed (see U.S. Exhibit KKK) that the westernmost pass shoaled up. The Sabine-Neches Canal entered the river at the small pass referred to by Thomas Bilbo, U. S. Deputy Surveyor (who surveyed and mapped this area in the fourth quarter of 1838), as 3rd West Fork [see Louisiana Exhibit EEE, Item 18 ("Map of Sabine-Neches Waterway, Texas," August, 1944, Plat No. 4 of House Document No. 571, 79th Congress, 2nd Session) and shown on this exhibit as West Pass between Middle Pass and Little West Pass], the latter being the westernmost pass identified by Bilbo on Township Plat 12 South, Range 15 West, as 2nd Fork. The route chosen for the canal offered better alignment for navigation by ocean-going vessels. Historically, the

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the dredged channel and would probably be deposited in the channel." Also, Transcript (May 20, 1974), pp. 135-136.

[16] Louisiana Exhibit EEE-19.

[17] Transcript (May 20, 1974), pp. 121-124.

westernmost pass was most used for navigation until completion of the Sabine-Neches Canal in May, 1908, later deepened for ship navigation, as shown on all of the U. S. Coast and Geodetic Charts Nos. 203 and 517 prior to 1908.

When the lands in dispute were surveyed in 1838 by Mr. Bilbo, he located the three islands in the head of the Sabine as being in Louisiana. He noted that the channels of the Sabine entering the north end of Sabine Lake were all navigable. This survey by Mr. Bilbo was recognized by the United States. The United States then patented the lands to Louisiana under the Swamp Lands Act.[18] By determining that the channels were navigable, Louisiana acquired the beds of the passes to the center of the West Pass by virtue of its sovereignty.

This Court stated in *United States v. Holt State Bank*, 270 U.S. 49, 54, 46 S.Ct. 197, 198, 70 L Ed. 465 (1925) as follows:

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such wa-

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[18] Louisiana's Exhibits EEE-4 and EEE-11 (U. S. government township plats covering Townships 12 South, Ranges 14 and 15 West and 13 South, Ranges 14 and 15 West), respectively, show that Thomas Bilbo excluded the four passes of Sabine River forming the three islands as navigable watercourses belonging to Louisiana by virtue of inherent sovereignty. Consequently, when Texas was granted permission to extend its eastern boundary to the middle of the Sabine River, Texas could move no farther east than the middle of 2nd West Fork (Louisiana Exhibits EEE-4 and EEE-18 where 2nd West Fork is shown as Little West Pass).

ters for the purposes of navigation in commerce among the states. . ."

There is no dispute that the islands were located as in Louisiana and that Mr. Bilbo determined that the channels were navigable. There is no evidence to establish that Louisiana divested itself of title to the beds of these navigable channels of the Sabine as it enters Sabine Lake. The only issue in this case has been whether Louisiana's boundary was on the west bank of the Sabine. This Court has held that the boundary between Texas and Louisiana is in the geographic middle of the Sabine. This means that Texas' boundary in 1848 was moved to include only the *west* half of the *westernmost* channel to coincide with the boundary of Louisiana. There is no question of acquiescence in this excepted area.

CONCLUSION

Louisiana respectfully suggests that the Special Master's report be accepted except for that portion fixing the boundary in the geographic middle of Middle Pass as Sabine River enters Sabine Lake and as to this portion of the boundary Louisiana urges that it should be established in the geographic middle of the westernmost pass of the Sabine River as it entered Sabine Lake, prior to the dredging of the ship channel, as shown on Louisiana Exhibit DDD.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana

WARREN E. MOULEDOUX
GARY KEYSER
Assistant Attorneys General,

OLIVER P. STOCKWELL
EMMETT C. SOLE
Special Assistant
Attorneys General,

By: _____
Oliver P. Stockwell
For Attorney General
State of Louisiana

TRIAL COUNSEL:

OLIVER P. STOCKWELL
Post Office Box 2900
Lake Charles, Louisiana, 70601

CERTIFICATE

I, WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of May, 1975, I served copies of the foregoing Acceptance By The State of Louisiana of the Report of the Special Master, with One Exception, by transmitting conformed copies of the same by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Texas, and upon the Solicitor General and Attorney General of the United States, and the City of Port Arthur, Texas, through its City Attorney.

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

By: _____
OLIVER P. STOCKWELL
Special Assistant
Attorney General

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